No. 75-777

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

—v.—

ENTERPRISE ASSOCIATION OF STEAM, HOT WATER, HYDRAULIC SPRINKLER, PNEUMATIC TUBE, ICE MACHINE AND GENERAL PIPEFITTERS OF NEW YORK AND VICINITY, LOCAL UNION NO. 638 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

RALPH P. KATZ
230 Park Avenue
New York, N. Y. 10017
Attorney for Respondent

Of Counsel:

ERNEST FLEISCHMAN
RICHARD BROOK
MARTIN R. GANZGLASS

DELSON & GORDON
New York, N. Y.

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BRIEF IN OPPOSITION

The Respondent opposes the petition for certiorari for the reasons to be presented.

Opinion Below

By its judgment and order the United States Court of Appeals for the District of Columbia has remanded this case to the National Labor Relations Board for further

proceedings. Petitioner's Brief for Certiorari, Appendix B at 137a-138a.[1]

Questions Presented

Whether the Supreme Court should grant certiorari in this case where the judgment and order of the United States Court of Appeals is not final.

Whether, when an employer and the union representing his employees enter into a collective bargaining agreement containing a valid "work preservation" provision, and thereafter the employer enters into a business contract on terms proposed by the other party which requires him to violate that provision, the union engages in a secondary boycott in violation of Section 8(b)(4)(ii)(B) of the National Labor Relations Act, 61 Stat. 140, as amended, 29 U.S.C. §158(b)(4)(ii)(B), when, in the absence of an applicable no-strike clause, it induces the employees of that employer to refuse to work on prefabricated goods which are being utilized by him in violation of the collective bargaining agreement.

Counterstatement of the Case

There is no factual issue in this case, nor is there any question about the sufficiency of the evidence. The Respondent (Local 638 or the Union) entered into a valid collective bargaining agreement with Hudik-Ross Company, Inc. (Hudik) containing a valid "work preservation" provision. Thereafter Hudik, in order to gain a business contract,

[1] All further page references are to the Appendices to Petitioner's Brief for Certiorari unless otherwise noted.

accepted terms which required Hudik to violate that provision of its agreement with the Union. The collective bargaining agreement did not preclude a strike in response to such a violation and Local 638 asked the employees it represented under its own collective bargaining agreement with Hudik not to work for Hudik only insofar as their labor would amount to an acceptance of the violation of the labor agreement under which they were employed.

Local 638 never induced or attempted to induce any employee, other than the employees it represented under its collective bargaining agreement with Hudik, to do anything. There was no picket line. There was no attempt to organize any employee. No employee of any other employer ever refused or failed to work. No person was ever asked to cease doing business with any other person.

The National Labor Relations Board (NLRB) did not find a "surrounding circumstance," but held that the Union violated one of the secondary boycott provisions of the National Labor Relations Act (NLRA or the Act) *solely* because Hudik, the employer of the employees represented by Local 638, could not enter into a new business contract on the terms proposed, without violating the "work preservation" provisions of its collective bargaining agreement.

REASONS FOR DENYING THE WRIT

A. The Order Below Is Non-Final

Supreme Court review should not be had, at least at this stage of the proceedings, as such review may serve only to affirm the Court of Appeals order to remand the case to the NLRB for further hearings. Subsequent action by the

NLRB may make review by this Court unnecessary, or may alter the issues so that neither party may desire review.

All of the usual reasons which have persuaded this Court of the wisdom of its general policy to deny petitions from non-final judgments and orders, such as the conservation of judicial resources, are applicable in this case. There are no extraordinary circumstances to remove this matter from the application of the rule. The work in question was completed years ago. Time is not a factor. We ask this Court to follow its general practice and deny the petition for certiorari from the non-final order. *Brotherhood of Locomotive Firemen and Enginemen et al.* v. *Bangor & Aroostock Railroad Co. et al.*, 389 U.S. 327 (1967); *see Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Company*, 240 U.S. 251, 257-258 (1916).

However, should this Court grant certiorari, we request that it render a final determination. We believe the record before the NLRB is dispositive of the three "issues" (*see* Petitioner's Brief for Certiorari at 7, n. 2) for which remand has been ordered.

The intention of the parties as to the scope of the applicable clause in the collective bargaining agreement, the first remand issue, is determined by the language of the agreement. There is nothing to support an inference or argument, and none was made by the charging party or by the General Counsel, that the language means anything other than what it reads, or that it was intended to be applied more narrowly than it actually was.

Whether Hudik "knowingly" violated his collective bargaining agreement, the second remand issue, has already been found in the affirmative. This Court is respectfully

referred to the finding of the Administrative Law Judge (ALJ) (Appendix C at 148a and at 148a-149a, n. 3) and to the order of the NLRB (Appendix C at 139a) where the finding of the ALJ is affirmed.

Whether Local 638 was trying to organize the employees of Slant/Fin Corporation, the third remand issue, has already been found in the negative by the ALJ (Appendix C at 125a) and that finding was also affirmed by the NLRB (Appendix C at 139a).

The order below is non-final and the case is not ripe for review.

B. This Court Has Spoken on the Issue and Further Decision Is Not Required

In *National Woodwork Manufacturers Association* v. *NLRB*, 386 U.S. 612, *rehearing denied* 387 U.S. 926 (1967), this Court specifically held that a work preservation clause similar to the one in the instant case was legal. 386 U.S. at 645-646. The ALJ and the NLRB both found that the clause in the collective bargaining agreement in this case is valid. There is no issue concerning its validity.

In *National Woodwork, supra,* this Court specifically held that the employees refusal to work in violation of the work preservation clause in their own collective bargaining agreement was not a violation of Section 8(b)(4)(B) of the Act. 386 U.S. at 646. This Court wrote that its holding could not "be made without an inquiry into whether, under all the surrounding circumstances, the Union's objective was preservation of work for Frouge's employees, or whether the agreements and boycott were tactically

calculated to satisfy union objectives elsewhere. . . . The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees." 386 U.S. at 644-645 (footnotes omitted).

Contrary to the current assertion by the Solicitor General, at p. 8 of the petition, the question in this case was not expressly reserved by this Court. In *National Woodwork, supra,* 386 U.S. at 616-617 n. 3 this Court noted that the specific issue was not before it, but this Court did not use any language indicating that it was reserving the question and that its reasoning in *National Woodwork* should not, therefore, be applied to the fact pattern in this case. Indeed, the Solicitor General in his memorandum to this Court in *J. L. Simmons Co., Inc.* v. *Local 742, Carpenters,* 404 U.S. 986 (1971) expressed the view that this Court's approach and reasoning in *National Woodwork* applied equally whether the employer's breach of his collective bargaining agreement was self-motivated or was in response to the demands of another businessman.

That understanding of *National Woodwork* by the Solicitor General in 1971 is the understanding of five Circuit Courts (Appendix A at 3a) including the Court below which wrote:

> ". . . the reasoning underlying the *National Woodwork* decision *compels* the conclusion that an employer's lack of legal control over the work the union seeks to preserve for its members cannot alone be decisive of the legality of the union's objectives." Appendix A at 16a (footnote omitted, emphasis added).

The NLRB points to only one factual difference between this case and *National Woodwork.* In the instant case Hudik intentionally breached the work preservation provision of its collective bargaining agreement in order to gain a business contract on terms proposed by another. In *National Woodwork* Frouge intentionally breached the work preservation provision of its collective bargaining agreement for a business reason; but its violation was not for the purpose of meeting business terms proposed by another. Petitioner's Brief for Certiorari at 11.

In the instant case the NLRB did not find any "remoteness of the threat of displacement by the banned product," or anything in "the history of labor relations between the union and the employers who would be boycotted," or anything in "the economic personality of the industry" (*see National Woodwork, supra,* 386 U.S. at 644 n. 38) or any other "surrounding circumstance" to evidence that Local 638's limited conduct was tactically calculated to satisfy union objectives elsewhere. It ascertained only that Hudik could not have gained a business contract without intentionally violating its collective bargaining agreement while Frouge's violation was not so motivated.

The above difference does not rise to the level of a legal distinction. Both *National Woodwork* and this case are equally covered by the same overriding principles of law. There is no basis in reason or law for the same union activity in the same circumstances to lose its protection and be prohibited solely because the employer's violation of his collective bargaining agreement is in one instance motivated by his desire to enter into a business contract on terms proposed by another business enterprise while, in the other, it is also motivated for business advantage, but it is self-

motivated. Indeed, although it is not necessary for the purposes of this case, it appears from the decisions of this Court that a strike limited so as to be only a response to an employer's intentional violation of a collective bargaining agreement is, in the absence of an applicable no-strike clause, not only protected concerted activity, *cf. Boys Market, Inc.* v. *Retail Clerk's Union, Local 777,* 398 U.S. 235 (1970); but also a specially protected "unfair labor practice" strike. *See Mastro Plastics Corp.* v. *NLRB,* 350 U.S. 270, *rehearing denied* 351 U.S. 980 (1956).

It is Hudik, the employer, not Local 638, which is the culprit here. As the Court below wrote:

> "The Board's right to control doctrine is a continuing attempt to circumvent the congressional proviso and is inconsistent with the Court's analysis in *National Woodwork.* Moreover, it is a continuing inducement for employers to violate their bargaining agreements. If employers do not want work preservation clauses to cover prefabricated units, they should not sign bargaining agreements with such clauses unless they so state. And when an employer gets himself into a bind, as did Hudik-Ross, he should arbitrate or negotiate his way out. Having the Board bail him out is to demean the National Labor Relations Act by encouraging deliberate, if not always planned, violations of bargaining agreements." Appendix A at 34a-35a (footnote omitted).
>
> "Hudik-Ross could have totally avoided the labor dispute merely by honoring its bargaining agreement and not bidding on a contract which required it to breach the valid work preservation provision it had negotiated with the union. Thus, to accept the Board's characterization of Hudik-Ross as a neutral bystander under these circumstances would allow the 'Cinderella-like transformation of an obviously involved party,' and would both render nugatory the commitment which Hudik-Ross made and demean the collective bargaining process which is the cornerstone of labor relations in the United States." Appendix A at 20a-25a (footnotes omitted).

This Court has repeatedly found that "the National Labor Relations Act is designed to promote industrial peace by encouraging the making of voluntary agreements governing relations between unions and employers." *NLRB* v. *American National Insurance Co.,* 383 U.S. 395, 401-402 (1952); *NLRB* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1, 45 (1937); *East Bay Union of Machinists, Local 1304, etc.* v. *NLRB,* 322 F.2d 411, 414 (D.C. Cir. 1963), *aff'd sub nom. Fibreboard Paper Products Corp.* v. *NLRB,* 379 U.S. 203 (1964).

And more recently citing *NLRB* v. *American National Insurance Co., supra,* the United States Court of Appeals for the District of Columbia found that "the obligation of collective bargaining is the core of the Act, and the primary means fashioned by Congress for securing industrial peace." *International Union of Electrical Radio and Machine Workers* v. *NLRB,* 426 F.2d 1243, 1249 (D.C. Cir. 1970), *cert. denied* 400 U.S. 950 (1970) (citation omitted).

This basic policy of the Act and of the Labor Management Relations Act, stated at 29 U.S.C. §§151 and 141(b) respectively, is supplemented by provisions defining collective bargaining (29 U.S.C. §158(d)) and by making it an unfair labor practice to refuse to bargain in good faith. 29 U.S.C.

§§158(a)(5) and 158(b)(3). The duty to bargain in good faith has been held to include the obligation to refrain from unilaterally modifying wages, hours or working conditions of employees during the term of a collective bargaining agreement even if done without anti-union animus, *NLRB* v. *C&C Plywood Corp.*, 385 U.S. 421, *rehearing denied* 386 U.S. 939 (1967); *see Allied Chemical & Alkali Workers of America, Local Union No. 1* v. *Pittsburgh Plate Glass Company, Chemical Division, et al.*, 404 U.S. 157 (1971); and the duty, continuing during the term of a collective bargaining agreement, to provide relevant information to the other party to the agreement. *NLRB* v. *Acme Industrial Co.*, 385 U.S. 432 (1967).

Hudik's violation was a straightforward, intentional breach committed because it could not comply with the collective bargaining agreement and, at the same time, meet the terms of a proposed business contract. Such intentional violation without even an offer of negotiation destroys collective bargaining just as surely as does a unilateral change in wages, hours or working conditions, *NLRB* v. *Katz*, 369 U.S. 736 (1962), or the failure to provide information. *NLRB* v. *Acme Industrial Co., supra.* Indeed it is difficult to contemplate anything more destructive of collective bargaining, and of the industrial peace that it is intended to promote, than the intentional violation of agreements already reached.

In short, this case is turned on its ear. It appears from the decisions of this Court that the employer's conduct, not the union's, constituted an unfair labor practice.

It is respectfully submitted that prior decisions of this Court have already determined the issue: in the absence of an applicable non-strike clause a refusal to work on

prefabricated goods by employees whose employer is utilizing such goods in breach of their collective bargaining agreement is concerted actively protected by Sections 7, 13, and the proviso to Section 8(b)(4)(B) of the NLRA (29 U.S.C. §§157, 163 and 158(b)(4)(B). The strike is not transmutted into conduct prohibited by Section 8(b)(4)(ii)(B) of the Act solely because the employer's breach was motivated by his desire to enter into a business contract on terms proposed by the other business.

This Court, having already addressed itself to the underlying issues, should deny certiorari now as it did when the same issues were raised in 1971. *J. L. Simmons Co., Inc.* v. *Local 742, Carpenters,* 404 U.S. 986 (1971).

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

RALPH P. KATZ
Attorney for Enterprise Association of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Machine and General Pipefitters of New York and Vicinity, Local Union No. 638 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO

ERNEST FLEISCHMAN
RICHARD BROOK
MARTIN R. GANZGLASS
of Counsel